UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 03-1253 03-1354 COMAR, INC. **Petitioner/Cross-Respondent** V. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC Intervenor ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD **BRIEF FOR** THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on a petition filed by Comar, Inc. ("the Company") to review and set aside an order of the National Labor Relations Board ("the Board") issued against the Company on July 31, 2003, and reported at 339 NLRB No. 110. (A 537-550.)¹ The Board has cross-applied for enforcement of its order. The Company's petition for review and the Board's cross-application for enforcement were timely filed on August 23 and October 27, 2003, respectively, as the Act places no time limits on such filings. United Steelworkers of America, AFL-CIO-CLC, successor to American Glass Workers of North America, AFL-CIO and its Local 519 ("the Union"), the charging parties below, has intervened in opposition to the Company's petition and support of the Board's cross-application.

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's order is a final order under Section 10(e) and (f) of the Act.

¹ "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

- 1. Whether substantial evidence on the record considered as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with critical requested information regarding its relocation plans and by failing to bargain in good faith regarding the effects of the planned relocation on unit employees.
- 2. Whether the Board acted within its discretion on fully supported findings in determining that the Company's longstanding applicator division bargaining unit remained appropriate upon its relocation to a nearby facility. If so, the Court should affirm that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union for a successor bargaining agreement to cover the relocated bargaining unit; by unilaterally changing the terms and conditions of employment for applicator division employees to take effect upon relocation; by withdrawing recognition from the Union upon relocation; and by constructively discharging unit employees who refused to relocate because of the foregoing violations.
- 3. Whether the Board acted within its discretion in refusing to reopen the record to litigate the impact of supposedly newly discovered evidence on certain portions of the Board's remedial order, while assuring the Company the right to

present such evidence, and litigate such matters, in an appropriate administrative compliance proceeding.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act, and the Board's Rules, are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

Based on a charge and an amended charge filed by the Union and a complaint filed by the Board's General Counsel, a hearing was held before a Board administrative law judge. Following the hearing, the judge sustained the complaint's allegation that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to provide the Union with essential information pertinent to the planned relocation of the Company's applicator division bargaining unit, and by failing to bargain in good faith with the Union regarding the effects of the relocation on unit employees. The judge further found that the applicator division bargaining unit remained a separate appropriate bargaining unit upon its relocation, and therefore that the Company violated Section 8(a)(5) and (1) of the Act: by failing to recognize and bargain with the Union as the exclusive representative of the applicator division employees at the new locale; by refusing to bargain with the Union over the terms for a successor collective-bargaining agreement for the expiring agreement concerning those

employees; by unilaterally imposing new, and in many instances, less desirable terms and conditions of employment without bargaining with the Union; and by constructively discharging the unit employees who refused to transfer under those conditions. (A 547-548.)

After all parties filed exceptions, the Board (Chairman Battista and Members Liebman and Walsh) affirmed the judge's findings and recommended order, modifying the latter in one respect not challenged by the Company in its brief to the Court. (A 537.) The Board also denied the Company's motion to reopen the record to produce newly discovered evidence that the Company claimed would impact upon the judge's recommended remedy. In so doing, the Board made clear that the Company would be given the opportunity to litigate such matters in a subsequent compliance proceeding, rather than in a contempt proceeding, if the Board's order herein were to be enforced. (A 537 n.2) The pertinent facts follow.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT.

A. The Company's Pre-Relocation Vineland and Buena Operations

The Company is in the business of manufacturing and assembling packaging products and medical device components for pharmaceutical, health

care, and personal care customers. The Company operates facilities in Vineland and Buena, New Jersey, which are the facilities involved in this case, and a facility in Puerto Rico. Prior to the relocation of the Vineland applicator division to Buena as detailed below, the Company's Director of Operations Gene Concordia and its Human Relations Director Ellen Duffy oversaw both operations, each of which had its own plant manager, supervisory staff, and work force. (A 539; 249-250, 412.)

The Company purchased the Vineland facility from Colonial Applicator Company in 1983. At the time, the Company succeeded to Colonial's longstanding collective-bargaining relationship with the Union, which had represented Vineland's work force for some 30 years. The Company and the Union were parties to a series of collective-bargaining agreements covering the Vineland or applicator division work force. The most recent such agreement ran from October 1, 1996 through September 30, 1999. The Vineland operation is the only company facility where any portion of the work force was unionized. (A 539; 259, 342-343, 379, 102.)

One building at Vineland is devoted to the manufacture of glass vials used by drug manufacturers to hold medicines that can be injected into patients. A second facility was devoted to the assembly of pharmaceutical medicine droppers or applicators for a niche market. That market consists of customers whose

limited needs require the use of relatively low-tech manufacturing methods such as were located at Vineland. The core of Vineland's so-called "applicator division" were approximately 16 semiautomatic rotary machines used to assemble rubber bulbs and calibrated pipettes into droppers. Those machines produced approximately 45 droppers per minute, far less than the 275 droppers per minute produced on the high-tech assembly machines employed in the Buena finishing department. Operating rotary machines requires considerable skill and hands-on work; it takes several months to become a minimally-proficient operator, and a number of years to become a master. At the time of the relocation, nearly all the Company's rotary machine operators fell into the latter category. (A 540; 241-243, 260-261, 418-419.)

Some of the droppers Vineland produced had to be assembled completely by hand; others could be assembled on three completely automated machines (Adams machines), which, producing approximately 70 droppers per minute, bore no resemblance to the extremely high technology machines used in the Buena finishing department. (A 540; 294, 296-297, 315, 418-419.) The Vineland operation also had a tumbler machine; a bellows machine; two cap-punching machines; a reknobbing machine; several stamping machines, and several wrapping machines, all unlike any machines used at Buena. (A 540; 260, 291-300.)

The applicator division's unionized work force, just prior to the relocation with which this case is concerned, consisted of approximately 50 employees, the majority of whom were high-skilled machine operators and hand assemblers. The work force also included materials handlers, quality control personnel, and maintenance and set-up mechanics. The division had its own plant manager, shift supervisors, assembly supervisors, and quality control supervisor. (A 540; 35-36, 48-49, 259-261, 292-296, 314-315, 425, 436-438.)

The Buena complex consists of three buildings: a corporate headquarters; a main factory where bulbs and pipettes for assembly into droppers are manufactured on blow and ejection molding machines, respectively; and a finishing facility containing highly automated, high speed machines for assembling, calibrating, and wrapping (heat-sealed cellophane) finished droppers. The droppers assembled in the Buena finishing department are different than those assembled in Vineland's applicator division. (A 540; 254-255, 418-419, 438.)

Until shortly before the relocation of the applicator division to Buena, the Buena operation had four departments--a finishing department, an ejection-molding department, a blow-molding department, and a seal department. (A 540; 266-267.) The seal department, which was housed in a separate room in the main

facility, had nothing to do with the manufacture or assembly of droppers.² The seal department was relocated to Vineland (which had extra space) a few months before Vineland's applicator division was relocated to Buena. (A 540; 309-310.)

Each of Buena's departments had its own department head, who reported directly to a plant manager. (A 540; 266-267) At the time of the relocation, the Buena complex employed approximately 65 employees in its finishing department. In the main, those employees perform unskilled tasks such as loading machines with necessary components and watching for production or assembly breakdowns and quality problems. Those employees have never been represented by a union, earned less, and worked under different terms and conditions, than the more skilled employees at Vineland. (A 540; 198, 203-209, 276, 435-438.)

B. The Company Notifies the Union of a Potential Consolidation of Facilities That Could Result in the Closing of the Vineland Facility but Provides No Details

By letter dated April 27, 1999, the Company's attorney notified the Union that the Company was "considering a potential consolidation of certain of its existing facilities . . . [and that s]uch a consolidation could result in the closing of the Vineland facility." (A 540; 127.) No mention was made at this time that the

² The seals produced in that department are made of aluminum and are sent to end users who crimp them onto vials filled with medicine that can then be injected into patients. (A 540 n.5; 308-309.)

facility to which the Vineland operation would be moved was the Buena complex, only 10 miles away. (A 540; 127.) The Union promptly requested further information, including "any internal or external studies, analyses, reports or recommendations, and any memoranda or other writings dealing with the potential consolidation." The Union also asked that the Company keep the Union apprised of any changes in its current plans as to when such consolidation would be implemented. (A 540; 130.)

The Company responded by letter dated May 27. The letter stated that consideration of a potential consolidation was ongoing, and was predicated in part on an Arthur Andersen study of November 1998, a business plan presentation, a site consolidation report, and the minutes of a corporate board meeting of December 18, 1998, all of which were provided to the Union. (A 540; 132-133) By letter dated June 25, the Union acknowledged receipt of the information and asked that it be notified immediately if a decision was made affecting the applicator division.

(A 540; 134.)

C. The Company Forms Concrete Plans to Relocate the Applicator Division Substantially Intact in a Separate Area at the Buena Complex; Despite the Union's Repeated Requests, the Company Fails to Disclose its Detailed Plans to the Union

Sometime prior to June 24, the Company's board of directors approved a plan to relocate the seal department from Buena to Vineland and to relocate the Vineland applicator division substantially intact in and around the room in the Buena molding facility that then housed the seal department. At Manager Concordia's direction, a detailed schematic of the vacated seal department room was prepared. The schematic laid out a floor plan for the location of the applicator division equipment that was to be moved from Vineland into and around the vacated seal department room. The schematic was completed on June 24. (A 540-541; 57,285, 289-298, 305.)

It was not until the parties met on September 8 that the Company actually confirmed to the Union its intent to relocate the applicator division to the Buena complex. (A 541; 356-358.) At no time prior to the actual relocation on September 27 did the Company ever supply the Union with the aforementioned schematic or inform the Union of its plans to relocate the applicator operation in an area separate and apart from the finishing department in Buena. (A 541; 318-320, 485-486.) Rather, the Company's attorney repeatedly informed the Union that the relocated employees were to be "interspersed" with other employees at the

Buena location; that the relocated applicator division employees would not remain a "homogeneous group;" and therefore that the Company had no obligation, and was refusing to, recognize the Union as the relocated employees' bargaining representative and negotiate with the Union regarding a successor collective-bargaining agreement to replace the extant agreement that was due to expire at the end of September. (A 542; 57, 318-322, 514-520.)

D. The Union Requests Bargaining for a Successor Agreement; the Company Informs the Union That It Intends To Relocate the Applicator Division to Buena but Withholds the Details of the Planned Relocation; the Union Requests Bargaining over Severance Issues, and Confronts the Company With Its Understanding of the True Facts Regarding the Relocation and Demands Recognition and the Commencement of Bargaining for a Successor Agreement Covering the New Location

By letter dated July 1, the Union notified the Company that it desired to modify the expiring collective-bargaining agreement and proposed that the parties arrange to meet to begin negotiations for a new agreement. (A 541; 135) By letter dated July 16, the Company informed the Union that it intended to close the applicator division and "consolidate the work and functions thereof into an existing [company] facility." (A 541; 137.) The Company added that it anticipated that the closing would occur on September 15, and that it was willing to bargain as required by the Act. The Company made no mention at this time that a decision had already been made to transfer the applicator division and its

employees substantially intact to a separate room in a building at the Buena complex to be operated independently from Buena's highly automated finishing department located in a different building 100 yards away. (A 541; 137.)

The Union immediately posted a copy of the Company's letter on a union bulletin board at the Vineland plant. Several days later, by letter dated July 20, the Union informed the Company that it would be seeking negotiations with the Company regarding severance issues. (A 542; 138.) In the meantime, on July 16, the same day the Union posted the Company's letter at Vineland, the Company held meetings with the first and second shift employees at Vineland. At each meeting, then Company Director of Operations Concordia told the employees that their work was being relocated to the Buena complex and assured them that, except for a few, the employees did not have to worry about their jobs. He said the move was going to be "like a beehive"--that they would just pick it up and move it intact. He also told the employees that they would not be represented by the Union and would receive lower wages and benefits. (A 542; 342-350.)

By letter dated July 20, the Union advised the Company that the Union was in receipt of "new information" and that its current understanding was "that the proposed action by [the Company] merely involves moving the plant assets a few miles away from the current plant and operating with the same work force."

(A 541; 139.) The letter continued: "this is to advise you that the Union is reserving all of its rights, including the right to bargain a new labor agreement; to take the position that the current (and/or successor) collective-bargaining agreement continues to apply to any new location of the work; that the bargaining unit continues at such new location; and the right, as appropriate dependent on our future analysis of this matter, to engage in decision and effects bargaining."

(A 541; 139.)

By letter dated July 26, the Company advised its customers of the planned relocation, assuring them "that nothing will change regarding the production of your products." (A 541; 47.) The letter continued:

This is solely and only a relocation of the same manufacturing process and the same experienced personnel that have historically produced and supplied your products all along. In addition, our quality systems, planning and inventory management systems and our commitment to meeting your needs remain the same. . . . As indicated, nothing beyond the physical location of this equipment will change.

(A 541; 47, 285.) The Company gave some unit employees a tour of the Buena facility where the operation was to be relocated but refused union requests for a similar visit. (A 323-324, 332, 374.)

By letter dated August 30, the Union advised the Company that it had learned from employees that company representatives had informed them that 99 percent of the bargaining unit would be moved to the Buena complex where they

would work separately from other employees--that "the plant was not closing, it was just moving from one building to another." (A 541; 143.) The letter stated that the Union wanted to discuss a successor collective-bargaining agreement, and "to know the Company's specific plans, and to work out procedures and terms for the relocation " (A 541; 143-144.)

E. The Company Posts Jobs at Buena for Bargaining-Unit Employees; the Company Rebuffs the Union's Repeated Attempts To Bargain For a Successor Agreement To Cover Operations at Buena by Falsely Insisting that the Company had Diffuse and Indefinite Plans To Spread the Relocated Workstations among the Machines in the Finishing Department and To Integrate the Work Forces

In early September, the Company posted at the Vineland facility the job openings that would be available at the Buena facility. On September 8, the Company and the Union met. Company Attorney Martin Sobol, accompanied by Operations Director Concordia, served as the Company's chief spokesman. The union representatives said that they wanted to negotiate a new contract, discuss the details of the move to Buena, and discuss severance matters. (A 541; 357-359.)

Timothy Tuttle, the Union's national representative, added that the Union had been told that Concordia had informed the employees that the operations were going to be moved "like a beehive." Sobol denied that this was going to happen and asserted that the relocated employees instead would be integrated among the existing employees in the Buena finishing department. (A 542; 357-359, 370-

372.) Tuttle then asked for a copy of the resolution passed by the Company's board concerning the move, but Sobol avoided any response. The Union then presented a proposed new agreement, which Sobol tossed aside, and asked what the Union wanted to discuss next. (A 542; 359-363.)

The Union gave the Company a request for information, including any "specific plans detailing the Company's proposed consideration as it pertained to the applicator division and its employees." (A 542; 360.) Sobol said that the information had been sent to the national union in May, but that he would again supply it. Concordia said nothing at the meeting about what he had told the employees or about the plan that had been approved by the Company's board in June to relocate the applicator division in a separate area and maintain operations exactly as they were in Vineland. That plan had not been provided the national union in May--it did not then exist--and was not provided in the package of materials Sobol provided the Union the next day. (A 542; 517-518, 520.)

In a covering letter, Sobol informed the Union that the Company was willing to negotiate a new agreement but only one that would span the limited time between the expiration of the current agreement and the date the relocation was effected. Sobol said nothing whatever in the letter about the Union's request that the parties negotiate an agreement to apply to the applicator division employees after the division was relocated to Buena. (A 542; 146-147.)

The parties met again on September 14, at which point the Union presented the Company with an unfair labor practice charge it had filed with the Board. Among other things, the Union's charge alleged that the Company had failed to bargain in good faith regarding the decision to relocate the applicator division and the effects of the decision on unit employees, and that the Company had manipulated the employees' terms and conditions of employment to avoid a bargaining obligation. (A 542; 8, 361.) At the September 14 meeting, after some discussion about the Union's information request and the Company's response, the Union stated that the information did not satisfy its needs and asked again for the details concerning the move--the location of the equipment, the supervisory structure, staffing, hours of operation, and other terms and conditions of employment. (A 542; 362, 484-485.)

Sobol insisted that the Union again put its request in writing, and told the Union, incorrectly, that the transferred individuals would be supervised by existing Buena supervisors and that the employees and equipment would be "mixed in with other firmly existing employees and machines." (A 542; 485.)

The Union next raised the subject of severance negotiations, which Sobol ignored, responding that the parties should simply extend the extant agreement until September 30, when the Company expected the move to be completed. (A 542; 53-56, 363-364.)

Thereafter, on September 20, the Union made another written request for "the Company's plans," including, but not limited to, "[the] physical location within the Buena facility, supervisory structure, staffing, hours of operation, and other terms and conditions of employment." (A 542; 152-153.)

On September 21, the Company faxed the Union certain information, including, most particularly, the representation that "[w]ork locations will be determined by classifications as we assimilate this equipment and the persons into the plan." (A 542; 154-156.)

The Company's representations were directly refuted by the schematic of the layout that the Company's board had adopted months earlier that was never supplied to the Union. They also were directly refuted by the announcement that the Company had sent to its customers. (A 543; 47, 57.) The Company also failed to inform the Union that the employees were to be supervised at the Buena location by their same supervisors, who were to be transferred to Buena along with the employees. The Company also failed to inform the Union that the employees would be made to sign forms acknowledging their status as "at will" employees and also that they would be subject to the detailed terms set forth in the extant Buena employee handbook. (A 547; 399-401.)

F. The Relocation is Effected on September 27; the Machines From Vineland Are Installed in or Immediately Proximate to the Room that Formerly Housed Buena's Seal Department; the Company Unilaterally Imposes New Wages and Other Terms and Conditions of Employment and Refuses to Recognize the Union as the Exclusive Representative of the Applicator Division Bargaining Unit; the Company Offers Nearly All Unit Employees Jobs; 24 of 47 Accept

The relocation was completed on September 27. As of that date, the Company no longer recognized the Union or applied the terms of its union contract to the former Vineland employees. A few days before the relocation, the Company offered all but 3 or 4 of the bargaining unit's approximately 50 employees the same jobs at Buena as they had performed at Vineland. Of those offered jobs, 23 accepted and 24 refused employment. (A 543; 37-38, 196-212.)

The employees who relocated continued to perform the same work on the same machines on the same shifts as at Vineland. Those shifts began and ended at different times than the three shifts worked by Buena's existing employees. No relocated employees worked on machines that had been at Buena prior to the move, or on machines outside the former seal department room and its immediate environs. The Company continued to assign to the applicator division precisely the same work as before the move; no work that would have been assigned previously was being assigned to Buena's finishing department and no work that would have been assigned to Buena's finishing department previously was

assigned to the relocated employees. (A 543; 261, 264-266, 271, 274-278, 280, 298, 303.)

Nearly all the machines and equipment used by unit employees at Vineland were moved to Buena, where they were located in, or immediately proximate to, a room that had previously housed Buena's seal department. As noted, that department, which was relocated to Vineland on September 26, was located in the building that houses the Company's molding departments. Buena's finishing department is located in a separate building some 100 yards away. (A 542; 290-300.)

The transferred machinery included 12 to 14 of Vineland's 16 rotary machines, a tumbler, a bellows machine, a wrapping machine (used on a daily basis), 1 or 2 cap-punching machines, 3 automatic assembly machines, and benches used for hand assembly. None of those machines was similar to any machines previously located in Buena. The rotary machines, the core of the applicator division's operations, were situated in the former seal's room, in the main factory building, as were the tumbler, the bellows machine, and the two benches used for hand assembly. (A 543; Tr 290-294.) The two cap-punching machines that were unique to the applicator division's operations were located in a storage room adjacent to the seal department room--a wall between the two was knocked down. (A 543; 295-297.)

Although Buena already had a quality control office in the main factory building, the Company established a separate quality control office for the applicator division. The applicator division's quality department, which was staffed by a transferred quality control person from Vineland, was housed in a room immediately adjacent to the former seal department room. (A 543; 311-314.) Also relocated immediately outside the former seal department room were Vineland's three automatic assembly machines. Those machines were less automatic, and far slower, than the high-speed assembly machines in the Buena finishing department. (A 540, 546; 296-298, 315.) Two wrapping machines were relocated from Vineland, only one of which was used regularly. That machine was situated next to the three assembly machines, immediately outside the division's quality control office. The area in which the relocated wrapping and automatic assembly machines were situated was sealed off by plastic sheeting from the rest of the main factory building. (A 543; 297-298, 314-315.)³

As of September 27, none of the transferred employees worked outside the former seal department room or its immediate area. (A 543; 275-279, 303, 432.)

³ Two transferred machines were placed in the finishing department building. One was a shrink-wrapping machine that was not used on a regular basis, and the other was a reknobbing machine, that was used to manufacture small runs of eyedropper pipettes, a process that was being phased out when it was relocated. (A 543 & n.8; 298-301.)

All of the employees who transferred remained on the same shift as they had worked in Vineland. (A 543; 274.) The transferred employees also had the same supervision. The first shift supervisor from Vineland, Ron Schultz, remained their immediate supervisor. After the transfer, Schultz was given the added responsibility of supervising production in the finishing department. Schultz continued to report directly to Larry Neber, who even before the relocation served in the dual capacity as Vineland's plant manager and manager of Buena's finishing department. The rest of the first shift management team--Production Planner Michael Schaeffer and Quality Control Supervisor Rose Gabriel--transferred from Vineland and continued in their same capacities. (A 543; 267-272, 37-38.)

Similarly, the second shift supervisor for the applicator division, Keith Anderson, was also a transferee from Vineland. In addition to his responsibilities with respect to the applicator division's second shift, which were minimal, Anderson became co-manager of the finishing department. Anderson's co-manager of that department, Linda Foster, had been working as a production supervisor in the finishing department when the Vineland operation was transferred to Buena. (A 543; 271-272, 426.) The second shift operators in the applicator division were considered self-sufficient, and both Anderson and Forster had their offices in the finishing department. (A 543; 427-428.)

After the relocation, nonunit material handlers had some contact with unit employees (principally with one unit employee who worked as a materials handler within the shop) when the latter would bring materials used in the applicator division to a staging area near where unit employees worked. Also, pursuant to an existing Buena program, unit employees were afforded an opportunity to crosstrain on other equipment outside the division, and to receive a pay increase if they successfully completed such training. As of the hearing, only two unit employees had completed the cross-training program; a third had tried but was unsuccessful. (A 542; 334, 447, 452-455, 462-463.) For the same reason, four or five employees from the Buena finishing department have trained to operate rotary machines operated by unit employees. Two or three were successful; none has been assigned to operate such machines on a regular basis. Because of the number of unit employees who refused to relocate, the Company hired about 10 new employees, who were assigned to the least-skilled unit jobs shortly after the move was affected. (A 542; 333, 350, 439, 455-462.)

Upon their relocation, the applicator division employees were required to sign forms acknowledging their status as "at will" employees subject to the rules, wage rates, and terms and conditions of employment set forth in the extant Buena employee handbook. They were integrated into the Buena work force's extant seniority list. Most of them took a substantial pay cut from \$11.50 an hour at

Vineland to \$9.29 an hour at Buena; some of their benefits were worse than under the union contract, and some were better. (A 542; 360-372, 384-385, 35-36.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)): by failing to provide the Union with critical requested bargaining information; by failing to engage in good-faith bargaining regarding the effects on unit employees of its decision to relocate the applicator division to its Buena facility; by refusing to continue to recognize and bargain with the Union as the exclusive bargaining representative of the applicator division employees on the false grounds that the employees and their work would be assimilated into the finishing department at the Buena facility; by refusing to bargain with the Union for a successor to the expiring collective-bargaining agreement for the applicator division unit and by unilaterally implementing new terms and conditions of employment for those employees to take effect on their relocation; and by constructively discharging the unit employees who refused to relocate under the above-described conditions. (A .537 & n.2, 547-548)⁴

⁴ The Board left to a further compliance proceeding the identification of any employees who had been offered jobs at Buena but who would have refused for reasons independent of the conditions outlined above. (A 548 n.15.)

The Board rejected the Company's motion to reopen the record to receive evidence that the Company claimed would show that operational changes had been made after the close of the administrative hearing herein that would, according to the Company, impact upon the continued viability of the applicator division bargaining unit as an appropriate separate unit and therefore impact on aspects of the Board's remedy. The Board held that the Company could present such evidence, and make any arguments regarding compliance with the Board's remedial order that that evidence arguably raised, in an appropriate compliance proceeding, after the issues of liability at issue in the unfair labor practice proceeding were finally resolved. (A 537 n.1.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing its employees in the exercise of their statutory rights.

Affirmatively, the Board's order requires the Company to recognize and bargain with the Union as the exclusive bargaining representative of the relocated applicator division bargaining unit; rescind any of the unlawfully imposed changes in terms and conditions of employment that the Union requests be rescinded; make employees whole for any loss of earnings or benefits suffered as a result of the unlawful changes; offer reinstatement under the pre-unilaterally changed terms and conditions to those employees who did not transfer to Buena, restoring their

seniority and other rights or privileges previously enjoyed; make those employees whole for any loss of earnings and benefits resulting from their having been constructively discharged; expunge any reference to their having been terminated from the Company's files and notify the employees in writing that said expungement has been effected; furnish the Union, on request, with relevant and necessary bargaining information; meet and bargain with the Union concerning the effects on unit employees of the Company's decision to relocate unit work. (A 537-539, 548-549.)

To remedy the failure to engage in effects bargaining in good faith, the Board's order requires the Company to pay all unit employees their normal wages from 5 days of the date of the Board's decision until the occurrence of the earliest of the following: (1) the date the Company bargains to agreement with the Union over the effects of the relocation on unit employees; (2) the date a bona fide impasse in such bargaining occurs; (3) the failure of the Union to request such bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of the notice of the Company's willingness to engage in such bargaining; and (4) the subsequent failure of the Union to bargain in good faith. The Board further specified that "in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from the date of the relocation to the time he or she secured equivalent

employment; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in [the Company's] employ at Vineland, with interest. (A 537.) Finally, the Board's order requires the Company to post an appropriate notice. (A 538-539.)

SUMMARY OF ARGUMENT

The Board's findings that the Company failed to bargain in good faith by withholding from the Union requested information critical to the Union's performance of its representational responsibilities, and by refusing to provide the Union with any opportunity for good-faith "effects bargaining" rests on compelling evidence. The Company never informed the Union that the applicator division employees and their machines would be moved to a separate section of the Buena complex where they would perform the same work, with the same supervision, in the same manner and for the same customers as before. Nor did it inform the Union that the employees and their operation would be separate from Buena's finishing department and its employees, or what the new terms and conditions of employment the Company would be imposing on the relocated employees.

The remainder of the Board's unfair labor practice findings depend on the efficacy of the Board's determination that the historical applicator division

bargaining unit remained intact notwithstanding the relocation to the Buena complex. That finding rests solidly on the Board's longstanding and judicially approved rule that historical bargaining units will not be rendered inappropriate absent compelling circumstances demonstrating that, from the employees' perspective, their bargaining unit no longer was rationale in light of operational changes that were made. Here, as just mentioned, no such showing was possible since the applicator division remained separate and substantially unchanged following its relocation to the Buena complex. The unilateral changes affected by the Company in wages and other benefits were of no practical significance, particularly given that they were unlawfully imposed.

The Board's refusal to reopen the record to hear, but rather to defer to a later compliance proceeding, the Company's claims that operational changes had been made that altered the continued efficacy of aspects of the Board's remedial order comports with the Board's longstanding and judicially approved practice and was reasonably applied here. The Board had before it a multitude of serious unfair labor practice allegations with important employee rights—to backpay, reinstatement, union representation, and collective-bargaining—all in the balance. The Board reasonably determined that the employees were entitled to a resolution of those matters before the Company could interject another whole round of litigation by claiming that operational changes had been made and implemented

without the employees' bargaining representative even having been consulted.

The statutory rights the Board is duty bound to protect, and the interests of administrative and judicial economy reasonably lead the Board to reserve for a later administrative proceeding the issues of compliance the Company attempted to raise before the underlying issues of liability presented in the instant unfair labor practice case were decided.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY: FAILING TO PROVIDE THE UNION WITH CRITICAL REQUESTED INFORMATION AND BY FAILING TO BARGAIN IN GOOD FAITH REGARDING THE EFFECTS OF THE COMPANY'S RELOCATION DECISION ON UNIT EMPLOYEES

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158 (a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees.⁵ In turn, Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as "the mutual obligation of the employer and [the

⁵ An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. *See Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994).

union] to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment" At a minimum, the obligation to bargain in good faith requires that an employer supply a union with requested information that is relevant to the fulfillment of its duties to represent unit interests in bargaining. *See Crowley Marine Services, Inc. v. NLRB*, 234 F.3d 1295, 1296 (D.C. Cir. 2000) ("an employer must disclose information requested by a union as long as the information has a bearing on the bargaining process") and cases cited.

It has long been recognized that union representation is most vital when employees are confronted, as here, with a major event that could portend their loss of hard won benefits, as well as their very jobs. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987). When confronted with an upcoming event of this sort, a union cannot be expected to bargain in the dark but instead is entitled to requested information that is relevant to the task of representing employee interests in that context. Thus, an employer violates Section 8(a)(5) and (1) of the Act by refusing a union's request for all information pertinent to a relocation of unit work, or, in this case, the very bargaining unit itself. See Providence Hospital v. NLRB, 93 F.3d 1012, 1017-1020 (1st Cir. 1996) (information pertinent to bargaining about effects of merger on union's continued representational interests, and upon employees' future terms and conditions, must be produced); Mary Thompson Hospital v. NLRB, 943 F.2d 741, 746-747 (7th Cir.

1990) (hospital's agreement to affiliate with another entity relevant to union's ability to engage in effects bargaining that included, in addition to possible severance package, issue of retaining jobs and under what conditions).

While the decision to relocate an operation is often a managerial prerogative over which an employer need not bargain, an employer must bargain with its employees' extant representative over a broad range of topics that encompass the effects of such a decision on unit employees; such topics are not limited to severance packages and the like. Rather, effects-bargaining encompasses whether employees will be transferred and on what terms--their wages, benefits, work assignments, and work-preservation and assignments-to-work-outside-the-unit issues, to name a few. See Holly Farms Corp. v. NLRB, 48 F.3d 1360, 1368-1370 (4th Cir. 1995); Cooper Thermometer Company v. NLRB, 376 F.2d 684, 687 (2d Cir. 1967). Furthermore, information pertinent to bargaining about such effects, and determining whether employees have a right to continued representation after planned changes, is of eminent importance to the performance of an incumbent union's representational responsibilities. See Providence Hospital v. NLRB, 93 F.3d 1012, 1017-1020 (1st Cir. 1996).

The Board's finding that requested information is pertinent to bargaining and therefore must be disclosed is entitled to great deference on review, as is its determination that a party has failed to meet its good-faith bargaining obligations.

See *Crowley Marine Services, Inc. v. NLRB*, 234 F.3d 1295, 1296 (D.C. Cir. 2000)(information request); *Rock-Tenn v. NLRB*, 101 F.3d 1141, 1143 (D.C. Cir. 1996) (duty to bargain). The Board's findings regarding operative facts are entitled to affirmance if supported by substantial evidence. See cases just cited.

B. The Record Amply Supports the Board's Finding that the Company Unlawfully Withheld from the Union Critical Information Pertaining to the Planned Relocation of Operations that the Union Repeatedly Requested and Unlawfully Foreclosed Good-faith "Effects Bargaining" of the Relocation Decision

As shown in the Facts, the Union repeatedly asked the Company for all information pertinent to its planned relocation of the Vineland applicator division. It was consistently stonewalled and materially mislead regarding critical details, as a withheld document would have made crystal clear. Thus, the Company initially refused to inform the Union that the facility to which the Company planned to relocate the applicator division was actually the Buena complex located just 10 miles away. Such information was crucial, because it was likely to effect the extent to which it would be appropriate for the Union to press the interests of unit employees in following the work to the new locale and under what conditions.

Furthermore, once the site of the planned relocation was disclosed, the Company's negotiator repeatedly mislead the Union by insisting that the Company had no concrete plans concerning how the transferred machines would be situated at the Buena complex, other than that the plan was to integrate the machines and

employees among the existing finishing machines and employees in Buena. The Company also failed to give the Union the planned supervisory structure that would be in place at the Buena facility regarding the transferred operation, or the terms and conditions of employment that would be applicable to the employees.

The document that the Company withheld from the Union for a full 3 months prior to the move would have demonstrated beyond purview that the Company's plan was to segregate the application division in its own area, where the operation would continue virtually unchanged from the Vineland locale. As such, the document was unquestionably relevant to bargaining and the Board reasonably concluded that the Company's failure to provide it, while misleading the Union, was a blatant and indefensible violation of the Act.

Similarly, as discussed more fully below, the added facts that the Company planned all along that unit employees would continue to be supervised by the same individuals as before the move, and that they would be performing exactly the same work for the same customers in exactly the same manner as before the move were of equal importance. As the Board observed (A 547), with such information, the Union would have known that it stood on firm ground in challenging the Company's refusal to continue to extend recognition to the Union and to bargain with the Union over the terms for a new agreement.

Indeed, that information, and the Company's planned changes in terms and conditions of employment, which the Company also refused to disclose, virtually foreclosed the Union from realistically representing unit employees in effects bargaining over such terms and conditions, and advising them, from an informed position, the pros and cons of their accepting the Company's take-it-or-leave-it offers with respect to relocating. The Union accordingly had nothing to counter with respect to effects-bargaining concerning the initial terms and conditions that the Company intended to impose on relocation, and instead properly understood its role as pressing for the negotiation of a new agreement and a severance package for employees who did not relocate.

In this context, the Board reasonably concluded that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to provide the Union with requested information critical to the Union's proper performance of its representational responsibilities regarding protecting employee interests in bargaining about the effects of the relocation. *See Providence Hospital v. NLRB*, 93 F.3d 1012, 1017-1020 (1st Cir. 1996); *Mary Thompson Hospital v. NLRB*, 943 F.2d 741, 746-747 (7th Cir. 1990). And, by forcing the Union to bargain in the dark, and failing even to respond to the Union's request to bargain about a severance package and a new agreement, the Board reasonably concluded (A 547), the Company violated those same provisions by refusing to

bargain in fact with the Union about anything bearing on the relocation, including the many effects issues that the Union might have raised had it been properly informed. *See Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368-1370 (4th Cir. 1995); *Cooper Thermometer Company v. NLRB*, 376 F.2d 684, 687 (2d Cir. 1967).

Indeed, while the Company repeatedly notes (Br 37-38) that the Union made no specific "effects" proposals, the Board reasonably concluded that the Union could not be expected to bargain against itself without adequate information that the Company disingenuously refused to supply. *See Leach Corp v. NLRB*, 54 F.3d at 807 (rejecting a similar attempt to fault a union for failing to act on the ground that "Leach itself was primarily responsible for the Union's lack of knowledge"). *Accord United States Testing Co, Inc. v. NLRB*, 160 F.3d 14, 19-21 (D.C. Cir. 1998) (employer could not lawfully declare an impasse because, before deciding on an appropriate response, the Union needed the information that the employer had unlawfully withheld).

II. THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT THE RELOCATED APPLICATOR DIVISION BARGAINING UNIT REMAINED APPROPRIATE. THEREFORE, THE COURT SHOULD ENFORCE THE BOARD'S OTHERWISE UNDISPUTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT IN VARIOUS RESPECTS

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) makes it an unfair labor practice for an employer to withdraw recognition from an

established bargaining representative; repudiate an extant collective-bargaining agreement; and make unilateral changes in employee terms and conditions of employment, based upon the mere fact that its operations were relocated. See Leach Corp. v. NLRB, 54 F.3d 802, 810 (D.C. Cir. 1995); NLRB v. Rock Bottom Stores, Inc., 51 F.3d 366, 370 (2d Cir. 1995); Westwood Import Co., Inc. v. NLRB, 681 F.2d 664, 666 (9th Cir. 1982); NLRB v. Marine Optical, Inc., 671 F.2d 11, 16 (1st Cir. 1982). It is similarly well settled that an employer is said to have unlawfully discharged unit employees constructively who chose to quit rather than relocate in the face of such actions. See Holly Farms, Inc., 311 NLRB 273, 278-279(1993), enforced, 48 F.3d 1360 (4th Cir. 1993) (Section 8(a)(5) constructive discharge by conditioning employment on unlawfully imposed nonunion terms and conditions). See also NLRB v. Haberman Construction Co., 641 F.2d 351, 358 (5th Cir. 1981 (en banc) (Section 8(a)(3) constructive discharge where employees guit when forced "to chose between guitting its employ or continue in the face of the Company's unlawful repudiation of its bargaining obligations"); NLRB v. Ra-Rich Mfg. Co., 276 F.2d 451, 454 (2d Cir. 1960) (the same); NLRB v. Lone Star Textiles, Inc., 386 F.2d 535, 536 (5th Cir. 1967) (the same).

In the instant case, the Company's sole defense to the Board's findings that it committed just such violations is its contention that the Board erred in finding that the applicator division bargaining unit remained appropriate after its relocation to

the Buena complex. We now show that the Board's unit determination was well within its broad discretion concerning such matters and is predicated upon amply supported findings with respect to the operative facts. Accordingly, the Board's unit determination, and its unfair labor practice findings that the Company concedes flow from it, are entitled to affirmance by this Court.

A. Applicable Principles and Standards of Review

As this Court has recognized, when confronted with a challenge to the continued viability of an historical bargaining unit, the test is not whether the Board would have found the unit appropriate "under Board standards [as] if it were being organized for the first time." Rather, the employer has "a heavy burden" not simply to show that operational changes have occurred, but also to show that, from the employees' perspective, the "historical unit[] w[as rendered] unworkable or [could no longer] produce harmonious labor relations, so as to be repugnant to the Act." *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 117-118 (D.C. Cir. 1996). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (successor must show that, from the employees' perspective, changes have occurred such that their historical bargaining unit no longer remains viable).

This is so, not simply because of the Congressional policy favoring the fostering of stability in established relationships, but also because of the strong

separate identity and community-of-interests such a history of bargaining necessarily implies. *See, for example, Fraser & Johnson Company*, 189 NLRB 142, 151 n.50 (1971), *enfd. in relevant part*, 469 F.2d 1259 (9th Cir. 1972). Thus, with the mechanisms of successful bargaining already in place and a proven track record of employees coalescing for bargaining around their mutual interests, the Board appropriately precludes the vitiation of the important employee right of free choice simply because a relocation has occurred that leaves the "job situations [of employees] essentially unaltered." *Leach Corp. v. NLRB*, 54 F.3d at 810 (attribution omitted). Indeed, as the Third Circuit noted in an analogous circumstance, any other conclusion would permit an employer to push "the Union out the door" whenever an employer might opt to "modernize its facility." *Molded Acoustical Products, Inc. v. NLRB*, 815 F.2d 934, 940 (1987).

Where, as here, a challenge is lodged to the continued viability of an historical unit, the weight to be afforded to the various traditional factors falls exclusively within the Board's domain. Thus, the weight the Board affords to such factors must be upheld on review, unless arbitrary or irrational in light of the Act's policies. *See American Hospital Association v. NLRB*, 499 U.S. 606, 611-613 (1991) (it is within the Board's purview to determine reasons for selecting one unit over another so long as reasons comport with the Act's policies). The Board's determination regarding the extent to which such factors exist is subject to review

under the substantial evidence standard. *See Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 117-118 (D.C. Cir. 1996) (Board's unit determination upheld where subordinate findings supported by substantial evidence and rationale did not offend Act's policies).

B. The Board Reasonably Determined that the Historical Applicator Division Bargaining Unit Remained Rationale and Viable Following Its Relocation Because the Relocated Operation Remained a Substantially Separate Operation that Performed the Same Work, for the Same Customers, with the Same Machines, Supervision and Work Force as Before

The Board's finding (A 544) that the historical bargaining unit remained appropriate after the relocation rests solidly on the Company's undisclosed plans, carried to fruition, to have unit employees continue "to perform the same work on the same equipment making the same products . . . under the same supervision . . . in a separate room in a building apart from other Buena finishers[,]" whose skill levels were far inferior to those of the highly-trained, experienced employees who comprised the applicator division work force. As the Board also emphasized (A 545), the Company itself recognized the need to maintain the applicator division as a separate operation--not only did the Company locate the operation intact in its own discreet area, but it also assured its customers that nothing about the operation would change upon relocation.

In point of fact, nothing did during the period immediately surrounding the relocation, and even for a year and a half after, through the time of the hearing herein. The applicator division remained separate and apart from Buena's finishing department--there was no sharing of employees, the applicator division's employees worked shifts with different starting, lunch, and finishing times than anyone else in the complex, and the only work-related contacts of any regularity were between Buena fork-lift operators, who dropped off components and picked up assembled products from a staging area, and a single applicator division materials' handler. The Company had no plans to integrate the work forces when the move was affected; the Buena employees were completely unequipped to perform applicator division work, and the skilled applicator division employees were needed in that department and it would have been foolish to assign them elsewhere.

The applicator division and the Buena finishing department serviced different customers with different needs and different product requirements. The small orders applicator division customers placed could not be filled economically by use of the finishing department's high-speed machinery. Many such customers could not even afford the molds necessary to have the pipettes for their droppers manufactured by Buena's injection molding machines; instead, they needed the applicator division to produce pipettes by a skilled hands-on process. Also, some

applicator division customers required special pipettes or bulbs that could not be produced on Buena's machines, and again depended on the applicator division to produce them by a hands-on skilled process, or to purchase them from outside suppliers. On the other side, the Buena finishing department only filled big orders that could maximize the efficiencies of the department's high-speed operations, operations that were manned by unskilled employees who were nothing more than machine attendants. Importantly, no unit employees performed Buena finishing department work and no Buena employees performed unit work coincident with the move or anytime thereafter.

As this Court has held in comparable circumstances, this array of facts "provides ample support for the Board's conclusion that the basic character of the work environment was not fundamentally changed by the relocation " *Leach Corp. v. NLRB*, 54 F.3d at 809-810. *Accord Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118-119 & n.13 (D.C. Cir. 1996) (historical bargaining unit remained appropriate as against plant wide unit where historical unit's employees functioned as separate work "gang" and possessed greater skills than other employees); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (service unit relocated to another commonly-owned service facility remained appropriate separate unit where wall separated two operations).

Furthermore, as the Board emphasized (A 545), the separate assembly operations, as described above, remained virtually unchanged a full year and a half after the move to the Buena complex. Thus, while employees were given the opportunity to cross-train, only a handful of employees chose to do so, and then only because being proficient on at least seven different types of equipment was a requirement to qualify for a high-level wage increase under the Buena pay scale. Only two Buena employees succeeded in learning to operate some type of applicator division machine during the time period, and none did so as a regular part of his or her work responsibilities. Similarly, the few applicator division employees who trained on Buena finishing equipment did so for wage increase purposes, and did not work outside their assigned applicator division jobs as a regular part of their duties.

Such minimal employee interchange, and the complete absence of functional integration between the Buena finishing department and the relocated applicator division, served only to solidify the Board's conclusion (A 545) that the historical bargaining unit should not be disturbed. *See Banknote Corp. of Amer. v. NLRB*, 84 F.3d 637, 650-651 (2d Cir. 1996) (inconsequential that unit employees "only occasionally perform[ed] tasks assigned to employees in other bargaining units and [were] trained to perform other tasks several months after [the employer] reopened the plant"); *California Pacific Medical Center v. NLRB*, 87 F.3d 304,

310 (9th Cir. 1995) (occasional interchange inconsequential) and cases cited; *Staten Island Hospital v. NLRB*, 24 F.3d 450, 456 (2d Cir. 1994) (the same).

C. The Board Rationally Discounted the Other Factors the Company Relies Upon In Attacking the Board's Finding that the Relocated Historical Unit Remained Appropriate

The Company notes (Br 38) that all employees at the Buena complex were subject to the same wage scale, benefit package, work rules, and other terms and conditions of employment as specified in the employee handbook. The Company claims that this uniformity supports a finding that the applicator division unit was merged with, or accreted to, the larger group of unrepresented Buena employees and lost its identity as a separate appropriate unit.

Where, as here, a unionized operation is relocated substantially intact, and unit employees comprise at least 40 percent of the relocated operation, the relocation is regarded as a nonevent for bargaining purposes. In such circumstances, an employer is required to continue to honor the terms of an extant bargaining agreement, or bargain to impasse before implementing new ones.

(A 537 n.2 citing *Radio Station KOMO-AM*, 324 NLRB 256, 262-263 (1987) (holding that, where substantial continuity of bargaining unit operations exists following relocation, duty to bargain continues uninterrupted) and cases cited. *Accord Westward Import Co., Inc. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982) (where substantial continuity in operations exists following relocation, extant

collective-bargaining agreement continues to apply); *NLRB v. Marine Optical*, *Inc.*, 671 F.2d 11, 14 (1st Cir. 1982) (the same). It follows that where, as here, an employer ignores that bargaining obligation to impose new terms and conditions of employment, it may not rely on those changes to show the historical bargaining unit is no longer appropriate. *See Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (where relocated unit remained appropriate, unilateral changes implemented by employer were unfair labor practices). *See also NLRB v. Rockwood Energy and Mineral Corp.*, 942 F.2d 169, 175-176 (3d Cir. 1991) (where duty to bargain remained unchanged after stock acquisition, unilateral changes were unlawful); *Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987) (once duty to bargain attached in successorship context, unilateral changes were unlawful and could not justify challenge to continued vitality of unit).⁶

The Company also notes (Br 31-36) that at Buena the applicator division and finishing department are in close proximity and share common supervision, and argues that those facts support a finding that the division no longer remains an appropriate unit. However, the close proximity of the two operations cannot

⁶ As the Board's administrative law judge observed (A 545) the Company's failure to give the Union an opportunity for informed effects bargaining provides yet another reason for discounting as inconsequential the changes that the Company had affected in the applicator division employees' extant terms and conditions of employment. *See Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368-1370 (4th Cir. 1995).

detract from the Board's well-supported finding, discussed above, that the applicator division's operation stood sufficiently separate and apart from the finishing department's to maintain its separate identity. Thus, whatever import that close proximity might have had if the issue before the Court was presented in the context of an original unit determination, the proximity of the two operations has no practical significance in the instant context. *See Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118-119 & n.13 (D.C. Cir. 1996); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996).

As for common management, it was always the case, even before the relocation, that the applicator division and the Buena operations were overseen by the same corporate officers and that the plant manager at Vineland had oversight responsibilities for the finishing department at Buena. The relocation of the applicator division to Buena did nothing to change any of that. And, the fact that, upon relocation, the applicator division's supervisors also had responsibilities in Buena's finishing department was of no practical significance from the only viewpoint that counts—that is, through the eyes of the applicator division's unit employees. From their perspective, the fact that their supervision remained unchanged could only have fortified the conclusion that "the basic character of their work environment was not fundamentally changed by the relocation." *Leach Corp. v. NLRB*, 54 F.3d 802, 810 (D.C. Cir. 1995).

III. THE BOARD ACTED WITHIN ITS DISCRETION IN DENYING THE COMPANY'S MOTION TO REOPEN THE RECORD AND DEFERRING TO AN APPROPRIATE COMPLIANCE PROCEEDING THE COMPANY'S CLAIM THAT POSTHEARING CHANGES HAVE BEEN MADE THAT IMPACT ON THE BOARD'S REMEDIAL ORDER

The Company makes no attack that the record evidence fails to support the Board's remedial order, assuming that the Board's unfair labor practice findings are affirmed. Instead, the Company claims (Br 53-60) that the Board should have reopened the record to receive evidence of alleged post-hearing operational changes that the Company claims make a unit comprised of applicator division employees no longer appropriate, thus impacting on various aspects of the Board's order.

Contrary to the Company, it has long been the Board's judicially approved practice to bifurcate proceedings--to first resolve in an unfair labor practice proceeding whether unfair labor practices have occurred and issue appropriate remedial relief on the record before it, and then, once the propriety of such findings and relief has been established, to entertain arguments in a subsequent compliance proceeding regarding why changed circumstances have made compliance with any or all aspects of the Board's remedial order inappropriate. *See Great Lakes Chemical Corp. v. NLRB*, 967 F.2d 624, 629-630 (D.C. Cir. 1992) (since the employer will "have an opportunity to assert all recognized

defenses related to compliance hearings," "we reject as premature [the employer's] present objection to the apparent breadth of the Board's order").

The Board has broad discretion whether to depart from that practice where, as here, it is asked to modify an otherwise appropriate remedy based upon alleged changed circumstances. However, the Board is particularly reluctant to depart from its usual practice, and entertain such motions, where, as here, the unfair labor practice litigation involves numerous and serious issues that are likely to have to be resolved in court before the issue of compliance is even brought into question. In such circumstances, the conservation of scarce administrative and judicial resources, and the interests of the employees whose rights the Board is duty bound to protect, require as prompt a resolution as possible. Permitting the record to be reopened, with further hearings before an administrative law judge and an appeal to the Board to follow, before closure is brought with respect to the fundamental issues of liability, would, in the Board's considered judgment, defeat, rather than advance, the Act's policies. See Lear Siegler, Inc., 295 NLRB 857, 861-862 & 30 (1989), cited with approval, Regal Cinemas, Inc. v. NLRB, 317 F.3d 300, 314 n.8 (D.C. Cir. 2003); Peter O'Dovero, 325 NLRB 998, 1000 n.11 (1998), enforced in relevant part, 193 F.3d 532, 539 (D.C. Cir. 1999).

At the same time, denying the Company's motion to reopen the record did nothing whatever to prejudice the Company. The Board made clear (A 537 n.1)

that the Company could present in an appropriate compliance proceeding any evidence that post-dated the administrative hearing herein and make any arguments based upon that evidence regarding the continued vitality of any aspect of the Board's remedial order.⁷

The General Counsel and the Union would have in such a proceeding to cross-examine the Company's witnesses, introduce countervailing evidence, and make legal arguments to defeat the positions the Company takes. All parties would then have access to the Board and ultimately a reviewing court, to determine whether the specifics of the remedial relief ordered comport with the facts and applicable law. Importantly, the action the Board took assured the Company that it would not face contempt proceedings, if the Board's order herein is enforced, but instead will be given every opportunity to litigate its remedial compliance issues in an appropriate legal forum.

Finally, the Company's arguments (Br 53-60) predicated on compliance communications between company counsel and the Board's Regional Director,

The Company has improperly included in its Statement of Facts (Br 25-26) a detailed recitation of its evidentiary proffer to the Board without indicating that that recitation is not based upon hearing testimony, but rather a rejected evidentiary proffer. While informing the Court of the substance of its evidentiary proffer would have been entirely proper, the section of the Company's Statement of Facts entitled "Comar's Continued Consolidation Since September 1999" (Br 25-26) is both misleading and improper.

after the Board's decision issued, were never made to the Board, nor were those communications brought to the Board's attention, through an appropriate motion. Therefore, under Section 10(e) of the Act (29 U.S.C. § 160(e)), those arguments may not properly be considered by the Court, and the letters themselves may not properly be made part of the record since they are not "material" to any argument properly before this Court. *See Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1378 (D.C. Cir. 2002).⁸

Indeed, in seeking to fault the Board's Regional Director for declining to do precisely what the Board itself declined to do--that is, resolve compliance issues while the Company was still disputing the underlying issues of liability--the Company improperly seeks to bring before the Court what amount to settlement communications. As such, the Company's actions directly controvert the Federal Rules of Evidence, Rule 8, which specifically provides: "Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

⁸ Still pending before the Court is a Company motion to supplement the record on appeal to include the above-mentioned communications, a motion that both the Board and the Union have opposed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review and enforcing the Board's order in full.

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